

EXHIBIT 4



EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

October 27, 2004

Wayne D. Hettenbach
Wildlife and Marine Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
Benjamin Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369

Re: *Washington Toxics Coalition v. EPA*, Case No. C01-0132C
Modifying the Court-Ordered Schedule for Effects Determinations
and Initiation of Consultation

Dear Wayne:

As you know, Judge Coughenour ordered the Environmental Protection Agency ("EPA") to make effects determinations and initiate consultations, as appropriate, on the pesticides at issue in the above-captioned case. That schedule runs through December 1, 2004. On July 26, 2004, we sent a 60-day notice of our intent to challenge EPA's failure to comply with Section 7 of the Endangered Species Act and its obligation to use the best available scientific information in making "not likely to adversely affect" and "no effect" determinations for numerous pesticide uses. Exhibit 1. In response by letter dated September 24, 2004, EPA indicated that it plans to review and update its "not likely to adversely affect" determinations utilizing the approach described in the "Overview of the Ecological Risk Assessment Process in the Office of Pesticide Programs, U.S. Environmental Protection Agency – Endangered and Threatened Species Effects Determinations" (January 23, 2004). Exhibit 2. While our 60-day notice highlights defects in EPA's effects determinations that are not corrected or adequately addressed in the "Overview," we are willing to forgo legal challenges at this time in the hope that EPA will go beyond the "Overview" and assess the best science and the full impacts of the pesticide uses that it determined are either not likely to adversely affect listed salmonids or will have no effect on listed salmonids.

EPA's proposed response, however, raises a compliance issue with respect to Judge Coughenour's July 2, 2002 order. First, that Order directs EPA to make effects determinations according to a schedule that is largely past. Implicit in this direction is the requirement that the effects determinations use the best science and address the full impacts of the pesticide uses as required by Section 7 of the ESA. By acknowledging the need to redo the "not likely to adversely affect" determinations, EPA is admitting that it fell short of preparing adequate effects determinations in accordance with the timeline imposed by the Court.

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Second, the July 2, 2002 order compels EPA to initiate consultation, as appropriate, based on its effects determinations. To initiate consultation, EPA must provide the National Marine Fisheries Service ("NMFS") sufficient scientific and factual information to enable NMFS to assess the full impacts of the pesticide use, to make a jeopardy finding, and to develop an appropriate incidental take statement. However, EPA has failed to provide sufficient information for NMFS to conduct the consultation. While it will be updating its effects determination to add some missing information, it obviously cannot do so in compliance with the court-ordered schedule.

We believe it is appropriate for the parties to develop a supplemental schedule and to ask Judge Coughenour to modify his July 2, 2002 to include deadlines for making revised effects determinations and submitting more complete information to NMFS for the consultations. Obviously, we will not concede that updating the effects determinations in accordance with the "Overview" will correct the deficiencies in EPA's effects determinations. We are attaching three sets of comments on the proposed counterpart regulations that reveal extensive shortcomings in the EPA risk assessments envisioned in the "Overview" document. Exhibits 3-5. Despite our disagreement with the soundness and completeness of EPA's risk assessments, however, we are willing to work with EPA to come up with a suitable, but expeditious, timeline for reviewing and upgrading the effects determinations. It is our view, however, that the review should encompass "no effect" as well as "not likely to adversely affect" determinations.

We look forward to working with you to develop a schedule to propose to Judge Coughenour, but want to do so in a prompt manner.

Sincerely,



Patti Goldman

Enclosures

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